

SERVED: May 21, 1992

NTSB Order No. EA-3561

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 30th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

GEORGE E. KOUBA,

Respondent.

Docket SE-9678

OPINION AND ORDER

The Administrator is appealing from the order Administrative Law Judge Joyce Capps issued July 25, 1989, dismissing his complaint in this proceeding. That complaint had charged respondent with violations of sections 135.213(a), 91.105(d)(1) and 91.9 of the Federal Aviation Regulations ("FAR," 14 CFR Parts 135 and 91), and it had sought the suspension of his airline transport pilot (ATP) certificate for 60 days.¹ The law judge issued her dismissal order in response to a motion to dismiss filed by respondent on July 7,

¹ A copy of the law judge's order is attached.

1989, noting therein that she had not received a response to the motion to dismiss.² Meanwhile, however, the Administrator had filed a response to the motion on July 20, 1989, but it was not received by the Board until July 27, 1989. On appeal from the dismissal order, the Administrator requests that the Board reverse the law judge and, in the interests of fairness, permit the Administrator to proceed with the case on the merits.³

Board precedent does not generally support a sanction for noncompliance with a discovery request unless the failure to comply disregards an order to compel discovery and is prejudicial. See, e.g., Administrator v. Air South, NTSB Order EA-2855 (1989); Administrator v. Smith, 4 NTSB 978 (1983); and Administrator v. Dunn, 4 NTSB 225 (1982). When the Administrator's failure to respond to discovery is the product of mere neglect or oversight, or when no showing has been made of prejudice to the requesting party, then the remedy for that failure is an order directing compliance. In this instance, the law judge had issued no such order. Moreover, she erroneously concluded that the Administrator had not filed a timely answer to the motion to dismiss.

Section 821.14(c) of the Board's Rules of Practice (49

² The law judge expressed the view that the Administrator's failure to respond to the supplemental discovery request was due to "inaction and total inattention to his responsibilities." Moreover, she found, without giving any reasons, that the Administrator's failure to respond "has prejudiced the respondent in the presentation of his evidence and position at hearing."

³ Respondent, pro se throughout these proceedings, has filed a reply.

CFR § 821.14(c)), provides a party 15 days from the date a motion is served upon him to file an answer, or, "such other period as the Board or a law judge may fix." In this case, 15 days from the time the motion was served on the Administrator, July 7, 1989, when it was mailed (it was received at the Board on July 12), would be July 22.⁴ The Administrator's reply to the motion was certified as mailed on July 20. In short, the Administrator met the rule's 15-day deadline.

In view of the foregoing, we think it appropriate to remand the case to the law judge for a ruling on the motion to dismiss that takes into account the Administrator's timely response to it.⁵

ACCORDINGLY, IT IS ORDERED THAT:

This matter is remanded to the law judge.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁴ The Administrator's evaluation of the time sequence is as follows:

"Since fifteen days from the July 7, 1989, filing of the motion to dismiss fell on July 22, a Saturday, the Administrator's response was due on Monday July 24, 1989. When the last day of the period falls on a weekend, the time limit is extended until the following Monday, if that is not a holiday. (49 CFR § 821.10)." We agree.

⁵ In the event the motion to dismiss is denied, the matter should proceed to hearing. Should the motion be granted, the law judge should state with precision the reasons underlying her ruling.